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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

TRUSTEES OF THE NORTHERN NEVADA)
OPERATING ENGINEERS HEALTH &)
WELFARE TRUST FUND, et al.,)

Plaintiffs,

v.

CRUZ EXCAVATING, INC., a California)
corporation; ZEPHYR COMPANIES, INC., a)
Nevada corporation; SCOTT FREIDUS;)
DOES 1-100; and BLACK AND WHITE)
COMPANIES 101-200,)
Defendants.

3:09-cv-347-RCJ-VPC

ORDER

Currently before the Court is Plaintiffs' Application for Judgment by Default (#12). The Court held oral argument on the motion on March 7, 2011.

BACKGROUND

In July 2009, Plaintiffs, the Chairman and Co-Chairman of the Boards of Trustees of multiple Trust funds,¹ filed a complaint against Cruz Excavating, Inc., Zephyr Companies, Inc., and Scott Friedus (collectively "Defendants"). (See Complaint (#1) at 1). Plaintiffs alleged that

¹ These trust funds include: (1) the Northern Nevada Operating Engineers Health and Welfare Trust Fund; (2) the Operating Engineers and Participating Employers Preapprentice, Apprentice, and Journeyman Affirmative Action Training Fund for Northern Nevada; (3) the Operating Engineers Pension Trust Fund; (4) the Operating Engineers Vacation and Holiday Pay Plan; and (5) the Operating Engineers Pensioned Operating Engineers Health and Welfare Trust Fund (collectively "Plaintiffs" or "Trust Funds"). (See Complaint (#1) at 1-2).

1 they brought this action pursuant to their fiduciary duties imposed under 29 U.S.C.
2 § 1104(a)(1). (*Id.* at 4-6). The first cause of action alleged payment of unpaid contributions
3 under the Employee Retirement Income Security Act of 1974 ("ERISA") pursuant to 29 U.S.C.
4 § 1132(a)(3), (g). (*Id.* at 3-4). Plaintiffs alleged that Defendants agreed to be bound by the
5 Collective Bargaining Agreements ("CBAs"). (*Id.* at 3). The CBAs consisted of the
6 Independent Northern Nevada Construction Agreement ("Short Form Agreement") between
7 Defendants and the Operating Engineers Local Union No. 3 of the International Union of
8 Operating Engineers, AFL-CIO (the "Union") and the Master Agreement for Northern Nevada
9 between Defendants and the Nevada Chapter of the Associated General Contractors of
10 America, Inc. and the Union. (*Id.*). Pursuant to the CBAs, Defendants agreed to make fringe
11 benefit payments to the Trust Funds for every hour worked by individuals performing work as
12 operating engineers. (*Id.*). Defendants agreed to timely submit employer contribution
13 reporting forms to Plaintiffs on a monthly basis and agreed to permit Plaintiffs to inspect their
14 books and records regarding any payment due to the Trust Funds. (*Id.* at 4). Defendants
15 failed to report and contribute to the Trust Funds. (*Id.*). Defendants have not paid
16 contributions, interest, or liquidated damages to date, and have not submitted corrected
17 reports. (*Id.*). Plaintiffs alleged that they had to hire attorneys to enforce Defendants'
18 obligations under the CBAs. (*Id.*)

19 The second cause of action alleged an action to compel the filing of accurate monthly
20 reports under 29 U.S.C. § 1132(a)(3), (g). (*Id.*). Plaintiffs alleged that Defendants failed to
21 submit accurate and timely employer contribution reporting forms that detailed the number of
22 hours worked by all operating-engineer employees and the amount of contributions owed. (*Id.*
23 at 5).

24 The third cause of action alleged an action to compel an audit under 29 U.S.C.
25 § 1132(a)(3), (g). (*Id.*). Plaintiffs alleged that Defendants agreed to permit them to inspect
26 their books and records regarding any payment due to the Trust Funds in order to determine
27 the true and correct sum. (*Id.*). Defendants refusal to comply with their obligations has made
28 it impossible for Plaintiffs, absent a complete audit, to determine the full extent of the

Plaintiffs sought the following relief: (a) to compel Defendants to submit to an audit of their books and records, including Defendants' payroll and tax records; (b) the amount of the incomplete contributions; (c) interest assessed on the delinquent contributions calculated at a rate of 12% per annum; (d) the greater of either the statutory interest assessed on the delinquent contributions at the rate of 12% per annum or liquidated damages assessed on the delinquent contributions in the amount of the greater of 12% of each delinquency or \$35.00 per each delinquency; (e) the cost of the audit; (f) the costs of filing this action; and (g) for all attorneys' fees and costs of this action. (*Id.* at 6-7).

DISCUSSION

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1 delinquency was \$471,805.19 based on affidavits from the Trust Funds' collection
2 manager, (Wayne McBride Aff. (#12-3) at 2), and a Certified Public Accountant at Kafoury
3 Armstrong & Co., (Kristen Burgess Aff. (#12-3) at 7). (See Appl. for Default Judgment
4 (#12) at 5-7). Plaintiffs filed a supplement to the default judgment application stating that
5 they obtained a settlement from Financial Pacific Insurance Company in the amount of
6 \$55,232.76 and, thus, the default judgment should reflect a credit with that amount.
7 (Suppl. to Appl. for Default Judgment (#13) at 1-2).

8 Federal Rule of Civil Procedure 55(b) provides that the "court may conduct hearings
9 or make referrals—preserving any federal statutory right to a jury trial—when, to enter or
10 effectuate judgment, it needs to: (A) conduct an accounting; (B) determine the amount of
11 damages; (C) establish the truth of any allegation by evidence; or (D) investigate any other
12 matter." Fed. R. Civ. P. 55(b)(2)(A)-(D). "Rule 55 gives the court considerable leeway as
13 to what it may require as a prerequisite to the entry of a default judgment." *TeleVideo Sys.,*
14 *Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). "The general rule of law is that upon
15 default the factual allegations of the complaint, except those relating to the amount of
16 damages, will be taken as true." *Id.* at 917-18.

17 The court may consider the following factors in determining whether to exercise
18 discretion as to the entry of default judgment: "(1) the possibility of prejudice to the plaintiff,
19 (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the
20 sum of money at stake in the action; (5) the possibility of a dispute concerning material
21 facts; (6) whether the default was due to excusable neglect, and (7) the strong policy
22 underlying the Federal Rules of Civil Procedure favoring decisions on the merits." *Eitel v.*
23 *McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

24 ERISA provides that a fiduciary may bring a civil action to "(A) to enjoin any act or
25 practice which violates any provision of this subchapter or the terms of the plan, or (B) to
26 obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any
27 provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3).

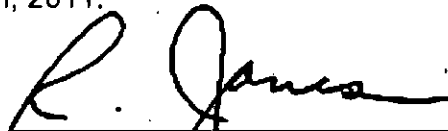
28 Plaintiffs assert that they are trying to enforce the terms of the CBAs. (See Appl. for

1 Default Judgment (#12) at 3). However, the CBAs are not in the record. Therefore, this
2 Court cannot evaluate the merits of Plaintiffs' substantive claims that Defendants are
3 violating the CBAs or determine the amount of damages based on interest rates listed in
4 the CBAs. Accordingly, the Court denies the application without prejudice. Upon refiling,
5 Plaintiffs should supplement the application with the CBAs, the basis for the guaranty
6 claims, and a basis for the calculations.

7 **CONCLUSION**

8 For the foregoing reasons, IT IS ORDERED that the Application for Judgment by
9 Default (#12) is denied without prejudice.

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11 DATED: This 18th day of March, 2011.

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14 United States District Judge
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